draw the distinction. *Evans* v. *Iglehart*, 6 Gill. & J. (Md.) 171; *Budd* v. *Williams*, 26 Md. 265. And the court in the present case also departs from general authority in defining consumable as meaning subject to wear and deterioration. See *Whittemore* v. *Russell*, 80 Me. 297. As all personalty wears and deteriorates, this definition, taken with the court's refusal to distinguish between specific and general bequests, would always convert life interests in chattels into absolute interests.

WAR — MILITARY PERSONS AS CONTRABAND OF WAR. — During the late Russo-Japanese War the plaintiffs reinsured a ship with the defendants and a clause of the policy warranted against "contraband of war." The ship, with two disguised Russian officers on board and bound for a Russian port, was captured and condemned by a Japanese prize court for carrying "contraband persons." The plaintiffs sued on the policy. *Held*, that the plaintiffs may recover. *Yangtsze Ins. Ass'n* v. *Indemnity, etc., Assurance Co.*, [1908] 1 K. B. 910.

It is settled that a neutral ship carrying persons in the service of one belligerent may be condemned if captured by the other. *The Orozembo*, 6 C. Rob. 430. Likewise a neutral vessel may be condemned for carrying contraband goods, though the usual penalty is confiscation of the objectionable cargo. *The Peterhoff*, 5 Wall. (U. S.) 28. Technically, carrying hostile persons, like the transmission of signals for a belligerent, is unneutral service, and as such service may be rendered anywhere the destination of the neutral ship is immaterial. But as the law of contraband merely regulates trade between neutrals and belligerents, the offense of carrying contraband is consummated only when the destination of the neutral is a belligerent port. MOORE, DIG. INTERNAT. LAW, § 1249. A further distinction appears. For unneutral service the acts of the offending shipmaster form a vital element of the offense, and ignorance will excuse if due care under the circumstances has been used. *The Rapid*, Edw. Adm. 228. For carrying contraband the proceedings are strictly against the neutral's cargo, and ordinarily the acts of the shipmaster are immaterial. In view of these distinctions the decision in the present case, that the facts here did not constitute a breach of the warranty, seems correct.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — STATUTORY DUTY TO PERMIT INSPECTION OF BOOKS. — A statute provided that stockbrokers should keep a record of every transaction in relation to transfers of stock and permit a state official to inspect such record, for the purpose of discovering whether a transfer tax had been paid. Failure to pay this tax was made a criminal offense. *Held*, that the statute is unconstitutional. *People* v. *Reardon*, 39 N. Y. L. J. 171 (N. Y., App. Div., March 1908). See NOTES, p. 621

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CONTRIBUTORY NEGLIGENCE OF BENEFICIARY UNDER LORD CAMPBELL'S ACT. — None of the American statutes[1] which allow an action for death by wrongful act indicate the effect of the contributory negligence of the beneficiary. When the right of action is given directly to the next of kin as such, the courts without exception construe the statute to provide a remedy conditional on the plaintiff's freedom from contributory negligence.[2] The result, though un-

[1] See statutes collected in 2 Kinkead, Torts, § 467.
[2] Westerberg *v.* Kinzua, etc., R. Co., 142 Pa. St. 471. See 9 HARV. L. REV. 282.

doubtedly commendable from the point of view of public policy, may be criticized as a piece of judicial legislation. It is somewhat comparable to the overruled doctrine that a devisee who murders his testator cannot take legal title under the statute as to wills.[3] In that case, however, the just result may be reached without additional legislation by the imposition of a constructive trust;[4] whereas in the present case the mere unintentional misconduct of the next of kin would hardly prevent him, at law or in equity, from sharing in the deceased's general estate.

A further argument against this construction presents itself — with the result of slightly splitting the authority — when the action for death must be brought in the name of the executor or administrator; for such a provision might indicate the intent of the legislature to furnish a remedy for injury to the estate rather than to the beneficiaries. On the other hand, even under this form of statute, the amount recovered is usually expressly exempted from the debts of the deceased.[5] Moreover, the generally accepted view is that the remedy is not a survival, but a new cause of action.[6] The plaintiff-administrator, therefore, even though not himself the beneficiary,[7] is to be regarded as representing not the deceased, but the next of kin, whether they are designated as beneficiaries or not, and he can have no better rights than those whom he represents. Hence in case of the contributory negligence of the beneficiary the courts cannot consistently refrain from applying the same construction to these statutes as to those which do not require the nominal interposition of a plaintiff-administrator. Consequently here, too, there may not be recovery, if there is contributory negligence, according to the great weight of authority.[8] It may perhaps be regretted that legislative action has not settled these matters.

From the position taken by the courts, it is no great step to read into the statute that where some of several beneficiaries have been negligent, others not, recovery may be denied to the former and allowed to the latter, all in the one action.[9] Such a result has been squarely reached only in Ohio, where the wording of the statute as to assessment of damages lends peculiar support to this construction. The question has probably escaped decision in several cases where the court erroneously imputed the contributory negligence of one parent to the other.[10] No such consequence should flow simply from the marital relation, aside from actual delegation of duty.[11]

The authorities as to some of these points are collected in a recent article by Professor John H. Wigmore. *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death*, 2 Ill. L. Rev. 487 (March, 1908). The rule is there approved, that regardless of the technical form of procedure designated by the statute, recovery should be refused the negligent beneficiaries and allowed the non-negligent. In states where the doctrine of imputing the negligence of a parent to his child is in force, the cases in which the negligent parent is not allowed a recovery for the child's death cannot be cited in favor of Professor Wigmore's theory. In addition to the jurisdictions cited by him as having nevertheless repudiated this doctrine and as having refused recovery by the administrator for the benefit of the negligent next of kin, five other jurisdictions[12] may apparently be cited. Moreover, in another case not cited,

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3 Riggs *v.* Palmer, 115 N. Y. 506.
4 See 36 Am. L. Reg. (N. S.) 225.
5 But not so in a few states. See Carlson *v.* Oregon, etc., R. Co., 21 Ore. 450.
6 2 Kinkead, Torts, § 468.
7 Chicago *v.* Starr, 42 Ill. 174. *Contra*, Wymore *v.* Mahaska Co., 78 Ia. 396.
8 Richmond, etc., R. Co. *v.* Martin's Adm'r, 102 Va. 201. *Contra*, Warren *v.* Manchester St. Ry., 70 N. H. 352; Wymore *v.* Mahaska Co., *supra*.
9 Wolf *v.* Lake Erie R. Co., 55 Oh. St. 517. See also Harton *v.* Forest City Tel. Co., 141 N. C. 455. *Contra*, Mill's Adm'r *v.* Cavanaugh, 29 Ky. L. Rep. 685.
10 Toner's Adm'r *v.* So. Covington, etc., Co, 109 Ky. 41. *Contra*, Macdonald *v.* O'Reilly, 45 Ore. 589.
11 Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369.
12 Ala. G. S. R. Co. *v.* Burgess, 116 Ala. 509; St. L., etc., R. Co. *v.* Dawson, 68 Ark. 1; Mill's Adm'r *v.* Cavanaugh, *supra*; Smith *v.* Hestonville, etc., R. Co., 92 Pa. St. 450. See Miller *v.* Meade Tp., 128 Mich. 98.

the New York court, not applying the doctrine of imputed negligence, allowed a negligent administrator-beneficiary to recover.[13]

Recovery of Interest on Advances by Brokers. — Stockbrokers who buy shares for customers on margin almost universally charge them with interest on the amount advanced. In the case of a stringency in the money market the interest so charged is usually in excess of the ordinary legal rate.[1] In a recent article Mr. Harold C. McCullom carefully analyzes the legal relations involved in such transactions in New York, criticizes the theories which have been advanced to sustain the legality of such charges, and defends what he believes to be the correct theory. *Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry Stocks on Margin*, 8 Colum. L. Rev. 281 (April, 1908). Except in the case of call loans, six per cent is the maximum legal rate of interest in New York.[2] The first theory upon which the broker may seek to sustain his right to recover interest in excess of six per cent is that the money advanced is borrowed by the customer from the bank through the agency of the broker, who has agreed for his principal to pay the call rate of interest.[3] Mr. McCullom finds this theory objectionable for several reasons. In the first place the New York decisions have repeatedly regarded the advance as an advance by the broker.[4] Furthermore, the practice seems to be for the broker to lend his own funds, and, since the banks seldom loan more than eighty per cent of the market value of the stock and the margin required of customers is usually only ten per cent of the market value, the broker is in fact called upon to furnish at least a part of the advance necessary to carry the stock.

The second theory regards the excess of interest as a commission.[5] This excess cannot be regarded as a commission paid the broker for getting the loan from the bank, since the New York statute fixes the sum that may be charged in such cases at not over fifty cents on one hundred dollars.[6] It would manifestly be unreasonable to regard this as indemnifying the broker for a commission paid by him to the bank.

The third view is that the advance is really a call loan by the broker to his customer. Mr. McCullom finds that this theory does not fit the case because the New York statute excepting call loans from the usual legal rate applies only to amounts over five thousand dollars and then only when the rate agreed on is in writing.[7] Moreover, call loans must be payable on demand, whereas it would seem that a stockbroker could not proceed to close out a sale on margin until a reasonable time after giving notice to his customer.[8]

The author believes that the fourth theory presents the fewest difficulties, though he admits that it is not fully sustained by the authorities. This theory regards the excess of interest as reimbursement to the broker for an authorized expenditure actually made in obtaining money to loan to the customer. This expenditure, though not expressly authorized, is authorized by custom. What the broker is here doing is to charge the customer with the actual cost of obtaining the money in the money market. Such a charge has been held not to be usurious if the broker does not recover more than he has paid.[9] But the broker does not pretend to charge each customer with the exact rate expended in effecting each particular loan. On the contrary, the excess charged is an approximation to the actual expense incurred; for example, by averaging the

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[13] Lewin *v.* L. V. R. Co., 52 N. Y. App. Div. 69.

[1] Dos Passos, Stockbrokers, 270.
[2] N. Y. Laws of 1879, c. 538; *ibid.* of 1882, c. 237, § 1.
[3] See Smith *v.* Heath, 4 Daly (N. Y.) 123, 126.
[4] Markham *v.* Jaudon, 41 N. Y. 235, 240.
[5] See Robinson *v.* Norris, 6 Hun (N. Y.) 233.
[6] N. Y. Laws of 1895, c. 467.
[7] N. Y. Laws of 1882, c. 237, § 1.
[8] White *v.* Smith, 54 N. Y. 522; Hess *v.* Rau, 95 N. Y. 359.
[9] Thurston *v.* Cornell, 38 N. Y. 281. *Contra,* Jackson *v.* May, 28 Ill. App. 305.